

LATHAM & WATKINS LLP
Sarah M. Ray (Bar No. 229670)
sarah.ray@lw.com
Alicia R. Jovais (Bar. No. 296172)
alicia.jovais@lw.com
Diana A. Aguilar (Bar No. 304427)
diana.aguilar@lw.com
505 Montgomery Street, Suite 2000
San Francisco, California 94111-6538
Telephone: +1.415.391.0600
Facsimile: +1.415.395.8095

Elyse M. Greenwald (Bar No. 268050)
elyse.greenwald@lw.com
200 Clarendon Street, 27th Floor
Boston, MA 02116
Telephone: +1.617.948.6000
Facsimile: +1.617.948.6001

GATTEY LAW OFFICE
Scott D. Gattey (Bar No. 180875)
scott@gatteylaw.com
1001 Laurel Street, Suite C
San Carlos, California 94070
Telephone: +1.650.596.7123
Fax: +1.866.371.3491

Attorneys for Defendant Oracle Corporation

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

GROUSE RIVER OUTFITTERS LTD.,

Case No. 3:16-cv-02954-LB

Plaintiff,

V.

ORACLE CORPORATION

Defendant.

ORACLE CORPORATION'S TRIAL BRIEF

Pre-Trial Conference: June 20, 2019

Time: 1:00 p.m.

Judge: The Honorable Laurel Beeler

Judge: The Honorable K
Courtroom B, 15th Floor

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1 Plaintiff Grouse River Outfitters Ltd (“Grouse River”) is a failed firearms and outdoor
 2 sporting goods retailer that operated out of a small town in British Columbia, Canada. In March
 3 2014, after a months-long sales process, Grouse River entered into a contract with NetSuite, Inc.
 4 (“NetSuite”) for the purchase and implementation of NetSuite’s cloud-based business management
 5 software.¹ For the next five months, Grouse River and NetSuite worked together to jointly scope
 6 Grouse River’s technology systems and business needs. In September 2014, the parties agreed to
 7 a 100+ page “Business Requirements Document” that set forth, in great detail, Grouse River’s
 8 business requirements and NetSuite’s ability to meet those needs. The implementation of
 9 NetSuite’s software was complicated, for a variety of reasons, with the launching postponed
 10 several times by both parties. But, in the final week of March 2015, Grouse River began running
 11 its business on NetSuite’s software, and after a few months of addressing initial “go-live” issues,
 12 Grouse River achieved some of its highest sales in its history.

13 Grouse River’s increased sales in the second half of 2015, however, were not enough to
 14 save Grouse River from its pre-existing financial woes. Before entering into its contracts with
 15 NetSuite, Grouse River was a consistently unprofitable retailer. In its seven years in operation
 16 prior to entering into any agreement with NetSuite, Grouse River earned only a small profit in one
 17 year and was otherwise unprofitable. Despite its chronic unprofitability, Grouse River’s founder
 18 and owner, Glenn Fallis, decided in 2013 to borrow nearly \$2 million to open a state-of-the-art
 19 “flagship” store that was four times larger than its original location. Grouse River’s sales,
 20 however, could not keep pace with its increased expenses in the new store and Grouse River
 21 immediately fell out of compliance with its bank loans. In the two years before entering into any
 22 agreement with NetSuite, Mr. Fallis’s mother, Wendy Fallis, had to inject hundreds of thousands
 23 of dollars into the company to keep it afloat. In early 2016, when its bank learned that Grouse
 24 River was out of compliance with its loans for the third year in a row, it foreclosed and demanded
 25 early repayment, triggering a cascade of financial repercussions that eventually forced Grouse
 26 River out of business in July 2017. Grouse River was also negatively impacted by market and

27 ¹ Defendant Oracle Corporation (“Oracle”) acquired NetSuite on November 7, 2016 and was
 28 substituted as the defendant. Nov. 11, 2018 Or., Dkt. 164.

1 economic factors that contributed to the demise of other similar Canadian firearm and outdoor
 2 retailers, including an increase in competition, an unfavorable exchange rate between the
 3 U.S./Canadian dollar, and consumers shift away from brick-and-mortar shopping.

4 Seeking a scapegoat for poor decision-making and mismanagement, Grouse River insists
 5 that NetSuite is to blame for the company's failure. Its theory is that NetSuite fraudulently induced
 6 Grouse River to enter into the parties' contracts by misrepresenting the capabilities of NetSuite's
 7 software during the parties' pre-contract negotiations. Even though Grouse River had no history
 8 of profitability, and despite the fact that it performed *better* with NetSuite's software than without,
 9 Grouse River seeks to recover from NetSuite more than \$15 million in lost profits, \$1.2 million in
 10 out-of-pocket expenses, and punitive damages.

11 The evidence at trial, however, will show that NetSuite never made any false
 12 representations to Grouse River and bent over backwards to satisfy a difficult, understaffed, and
 13 unprepared customer. The evidence will also demonstrate that NetSuite did not cause any of
 14 Grouse River's claimed damages, but rather, that Grouse River's demise was due to its own
 15 precarious financial condition pre-NetSuite, mismanagement, and other external economic forces.

16 **I. STATEMENT OF FACTS**

17 According to Grouse River, at some point in 2012 or early 2013, after reviewing
 18 promotional materials on NetSuite's website, Grouse River contacted NetSuite to learn more about
 19 its software products. Between mid-2013 and March 2014, NetSuite and Grouse River discussed,
 20 in person and via e-mail and telephone, Grouse River's purchase of a license to NetSuite's software
 21 and services to implement that software. These meetings and communications culminated in the
 22 parties signing two contracts in March 2014, a Subscription Services Agreement ("SSA") and a
 23 Statement of Work ("SOW"), which describe at a high level the products and functionality that
 24 Grouse River purchased and NetSuite agreed to provide. Those agreements are fully integrated,
 25 include anti-reliance disclaimers, and limit NetSuite's liability for any breach.

26 As is the case with all of NetSuite's software implementations, after signing the SSA and
 27 SOW, NetSuite worked closely with Grouse River over the course of the next five months to better
 28 understand Grouse River's business operations and legacy technology systems and determine,

1 within the scope of their previous agreements, how NetSuite could meet Grouse River's specific
 2 needs. The culmination of that work was a 100+ page "Business Requirements Document"
 3 ("BRD") that spells out in detail NetSuite's understanding of Grouse River's business
 4 requirements and NetSuite's plan for meeting those requirements, which the parties signed in
 5 September 2014. The document is comprehensive and details exactly what capabilities NetSuite
 6 would be able to provide Grouse River, based on Grouse River's business operations. Where
 7 NetSuite's products could not meet one of Grouse River's stated objectives without additional
 8 customization (which would cost more), the BRD clearly identified these functionality "gaps."
 9 The parties also entered into two Change Orders in September 2014 whereby NetSuite provided
 10 Grouse River customized scripts to address certain of Grouse River's business needs at no
 11 additional charge.

12 The Grouse River implementation got off to a rocky start, in large part, because Grouse
 13 River did not have the right personnel in place and failed to understand that implementation was a
 14 shared responsibility that required significant work from its end. NetSuite's products are not out-
 15 of-the-box, plug-and-play software; every implementation is customized and requires significant
 16 involvement from both the client and NetSuite to be successful, and Grouse River never
 17 understood or accepted this reality. While it took longer than either party expected to complete
 18 the implementation process, Grouse River made the decision to "go-live" on NetSuite's software
 19 at the end of March 2015. Until that date, Grouse River continued to run its business on its prior
 20 software systems.

21 After the "go-live" date, Grouse River confronted several challenges, many of which
 22 resulted from Grouse River's own failures to appropriately migrate its data from its old system to
 23 the new one (a responsibility that was delegated to Grouse River under the terms of the parties'
 24 agreements). NetSuite continued to work with Grouse River in good faith over the next few
 25 months to address and resolve all of the issues Grouse River encountered. By June 2015—just
 26 three months after the "go-live" date—Grouse River reached (and even surpassed) its sales targets,
 27 and starting in July 2015, achieved better year-over-year sales numbers in every one of the next
 28 five months (including achieving the second-highest month of sales in its history in September

1 2015). Thus, the road bumps that Grouse River faced in switching its business to a new software
 2 system were largely resolved and addressed within a few months of the “go-live” date.

3 But other factors intervened to undermine Grouse River’s sales successes. By the end of
 4 2015, the Canadian dollar had lost enormous ground to the U.S. dollar (which increased the cost
 5 of most of Grouse River’s inventory), and in February 2016, after three years of non-compliance,
 6 Grouse River’s bank demanded that Ms. Fallis inject \$750,000 to cover Grouse River’s debts and
 7 execute an additional \$475,000 security agreement (in addition to increasing Grouse River’s
 8 interest rate and imposing other covenants). Even Grouse River’s improved sales were not enough
 9 to overcome Grouse River’s crushing expenses and debt load. Without sufficient cash on hand to
 10 purchase inventory, pay rent, and meet its significant payroll expenses, Grouse River was forced
 11 to lay off staff and eventually close its retail and online operations in 2017.

12 **II. STATEMENT OF CLAIMS**

13 Grouse River is suing NetSuite for fraudulent misrepresentation, fraudulent inducement,
 14 and negligent misrepresentation. Grouse River also initially brought a breach of contract claim,
 15 which the parties litigated for nearly three years. In November 2018, the Court held that the
 16 limitation of liability provisions in the parties’ agreements were enforceable and limited Grouse
 17 River’s damages for any breach of the parties’ agreements. Nov. 21, 2018 Or., Dkt. 172, at 1-2.
 18 Six months later, and on the eve of trial, Grouse River belatedly sought to dismiss that claim
 19 without prejudice. May 19, 2019 Mot. to Amend., Dkt. 221. NetSuite opposed Grouse River’s
 20 belated attempt to dismiss its breach of contract claim without prejudice, which as explained in
 21 more detail below, is a blatant attempt to avoid the consequences of the Court’s summary judgment
 22 order and convert its breach of contract claim (where liability is now capped) into a fraud claim
 23 that it did not plead and is not entitled to pursue.

24 The Court held that if Grouse River wished to dismiss its breach of contract claim, it could
 25 do so but only with prejudice, and gave Grouse River until May 31, 2019, to decide how it wished
 26 to proceed. May 30, 2019 Or., Dkt. 235 at 2. As a result, NetSuite does not actually know what
 27 claims it is defending against at trial and may need to bring additional issues to the Court’s
 28 attention, depending on whether Grouse River decides to pursue its breach of contract claim or

1 dismiss that claim with prejudice. Either way, as NetSuite advised the Court at the hearing,
 2 NetSuite will need to revise some of its pre-trial filings which currently do not account for a breach
 3 of contract claim.

4 **III. LEGAL ISSUES THAT REQUIRE DECISION FROM THE COURT PRIOR TO
 TRIAL**

5 **A. The Court Must Clarify That The Only Theory of Fraud That Grouse River
 6 May Present To The Jury Is One Of Fraudulent Inducement**

7 Regardless of whether Grouse River maintains or dismisses its breach of contract claim,
 8 the Court must continue to ensure that Grouse River only pursues a theory of fraud that is based
 9 on NetSuite's alleged fraudulent inducement. This is necessary because Grouse River fails to
 10 understand that it may only present to the jury the specific allegations of fraud that it has actually
 11 pled in its Second Amended Complaint and that the Court has found sufficiently particular under
 12 Rule 9(b) to be actionable.

13 While Grouse River alleges three claims—fraudulent misrepresentation, fraudulent
 14 inducement, and negligent misrepresentation—all three claims are based on the exact same theory
 15 of harm, *i.e.*, that NetSuite (either intentionally or negligently) made certain allegedly *false
 16 representations* during the *pre-contract negotiations* that induced Grouse River to enter into the
 17 parties' March 2014 agreements. That is what each of the three (virtually identical) counts of
 18 Plaintiff's complaint allege. Sec. Am. Compl., Dkt. 43 ("Compl.") ¶ 219 ("In the numerous
 19 advertisements, website postings, press releases, meetings, e-mails and phone calls detailed in
 20 paragraphs 13-92 [*which all took place pre-contract*], NetSuite . . . made these representations
 21 with the specific intent that Grouse River would rely on them to cause and *induce Grouse River
 22 to purchase products and services* from NetSuite); ¶ 220 ("Based on NetSuite's superior
 23 knowledge of its software and its ability to customize, configure, and implement the software for
 24 Grouse River's specific needs and uses, Grouse River . . . justifiably relied on NetSuite's
 25 representations *by entering into its agreements with NetSuite.*"); ¶ 222 ("As a result of NetSuite's
 26 false representations, and Grouse River's reliance on them, Grouse River *entered into a contract*
 27
 28

1 ***with NetSuite . . .***).² Indeed, the Court has already held that Grouse River’s fraud claims are
 2 based on “*pre-contract representations*” and that “[a]ll three of Grouse River’s fraud claims allege
 3 that NetSuite’s misrepresentations induced it to enter the subject contracts.” Oct. 12, 2016 Or. on
 4 Mot. to Dismiss, Dkt. 41, at 18; *see also id.* at 8 (finding that all three of Grouse River’s claims
 5 “allege that NetSuite knew that the challenged statements were false and intended to induce Grouse
 6 River to rely upon them – meaning, to enter the contract[]” and that “[t]hey do not merely recast
 7 broken promises, which is to say contractual breaches, as fraud.”).³

8 Despite the Court’s explicit holding, Grouse River has made it clear in its pre-trial filings
 9 that it intends to present an entirely different theory of fraud to the jury—one that is nowhere
 10 pleaded in the complaint—that is based on the terms of the parties’ agreements. May 30, 2019
 11 Joint Proposed Pre-Trial Order, at 12-15. While it is not entirely clear, Grouse River seems to
 12 want to argue to the jury that NetSuite’s alleged failure to perform its contractual promises
 13 constitutes fraud because NetSuite never intended to perform those contractual obligations. The
 14 Court, however, has already held that Grouse River may not pursue this theory of fraud, and it
 15 should reiterate that instruction in light of Grouse River’s apparent confusion on this issue.

16 While a plaintiff may (in theory) pursue a fraud claim based upon “false promises”
 17 contained in a contract, to do so, the plaintiff must allege “that, at the time [the contractual]
 18 promises were made, defendants did not intend to perform those obligations, but that instead those
 19 promises were made in order to induce plaintiff[] into entering into the agreement itself . . .”
 20 *Velocity Staffing Corp., Inc. v. Resolve Staffing, Inc.*, 2008 WL 11342746, at *2 (C.D. Cal. June
 21 16, 2008); *see also* Jan. 5, 2018 Or., Dkt. 88, at 7 (“To maintain an action for deceit based on a
 22 false promise, one must specifically allege and prove . . . that the promisor did not intend to perform

24
 25

 26 ² The allegations supporting Grouse River’s claims for negligent misrepresentation (Compl. ¶¶ 229-241) and fraudulent inducement (¶¶ 242-251) are virtually identical and articulate the exact same theory of harm, premised on the exact same alleged misrepresentations.

27 ³ While the Court’s order addressed Grouse River’s initial complaint, Grouse River did not
 28 alter its theory of the case in the Second Amended Complaint, and the allegations supporting each count are virtually identical.

1 at the time he or she made the promise”).⁴ ***The problem for Grouse River is that nowhere***
 2 ***in the complaint does Grouse River ever allege that NetSuite never intended to perform its***
 3 ***contractual promises when it made them in March 2014.*** That critical allegation is missing,
 4 because Grouse River chose to plead that NetSuite *breached* the contractual promises, not that it
 5 *intended not to perform* them.

6 The Court recognized this deficiency in Grouse River’s complaint when it held that Grouse
 7 River’s allegations in paragraph 84 did not state an actionable false future promise. Jan. 5, 2018
 8 Or., Dkt. 88, at 7. In that paragraph, Grouse River alleges that NetSuite’s sales representatives
 9 “committed to have a four month implementation cycle, a top tier team of consultants on the
 10 project, 30 minute status calls every two weeks, had the clout to get things done and intended to
 11 keep the project on track.” Compl. ¶ 84. The Court found that allegation was not actionable
 12 because “[s]tatements that are predictions of future events or commitments to take some action in
 13 the future generally are not actionable fraud[]” and Grouse River had not alleged anywhere in the
 14 complaint that “NetSuite did not intend to carry out” its promises. Jan. 5, 2018 Or., Dkt. 88, at 7.
 15 The Court provided Grouse River with the opportunity to amend its complaint to cure this
 16 deficiency but Grouse River declined to do so. *See id.*; *see also* Jan. 27, 2018 Revised Sch. Or.,
 17 Dkt. 93 (noting that “plaintiff’s counsel withdrew his request to amend the complaint.”).

18 The Court has properly held, and Grouse River’s counsel previously agreed, that the only
 19 allegations of fraud that Grouse River may present to the jury are those that are included in the
 20 complaint and that the Court has found actionable. Jan. 17, 2019 Hearing Tr. 29:17-30:19; Jan. 5,
 21

22 ⁴ Moreover, Grouse River would have had to plead allegations of “false promises” with
 23 sufficient particularity. *Audigier Brand Mgmt. v. Perez*, 2012 U.S. Dist. LEXIS 161291, at *13-
 24 14 (C.D. Cal. Nov. 5, 2012) (dismissing fraudulent inducement claim where plaintiff failed to
 25 allege sufficient facts which showed that defendant harbored an intent not to be bound); *U.S. Bank,*
N.A. v. Miller, 2013 U.S. Dist. LEXIS 202180, at *23 (C.D. Cal. May 8, 2013) (dismissing fraud
 26 claim where counterclaim plaintiff failed to “allege, with particularity, facts showing that
 27 [counterclaim defendant] had no intention of performing its contractual promises at the time it
 28 executed the contract”); *Hsu v. OZ Optics Ltd.*, 211 F.R.D. 615, 620 (N.D. Cal. 2002) (“[U]nder
 Rule 9(b), a plaintiff must point to facts which show that defendant harbored an intention not to
 be bound by terms of the contract at formation.”). Had Grouse River alleged a present intent not
 to perform its contractual obligations, NetSuite could have challenged that allegation for failure to
 plead with particularity. Grouse River cannot avoid its Rule 9(b) obligation to plead each fraud
 element with *particularity* by simply failing to plead the required elements *at all*.

1 2018 Or., Dkt. 88 (identifying actionable allegations of fraud); *see also* Jan. 17, 2019 Case-
 2 Management Or., Dkt. 184, at 1 (“...Grouse River represented that it would confine its fraud case
 3 to the specific statements in the court’s order at ECF No. 88.”). And those allegations all involve
 4 alleged *false representations* (not false promises) that NetSuite supposedly made pre-contract to
 5 allegedly induce Grouse River to enter into the parties’ March 2014 agreements.⁵

6 This distinction matters. Grouse River originally pled claims of fraudulent inducement
 7 (for the alleged false pre-contract representations) and breach of contract (for NetSuite’s supposed
 8 failure to perform under the parties’ agreements). Now that the Court has held that Grouse River’s
 9 damages for any breach of contract claim will be limited, Grouse River is simply trying to convert
 10 its breach of contract claim into a fraud claim. Federal Rule of Civil Procedure 9(b) requires that
 11 a plaintiff plead fraud with particularity, and the Court should not allow Grouse River to simply
 12 transform its breach of contract claim into a fraud claim that it *never* pled.⁶

13 **B. The Court Must Also Preclude Grouse River From Attempting To Rewrite
 14 The Actionable Allegations of Fraud**

15 Grouse River is not only seeking to abandon the only theory of fraud that it pled but also
 16 is attempting to rewrite the specific allegations of fraud that the Court deemed actionable in order
 17 to ease its burden at trial. In Grouse River’s proposed statement of actionable allegations of fraud
 18 (attached to the parties’ pre-trial order as Ex. 10), Grouse River “paraphrases” its allegations in
 19 ways that are self-serving, misleading, and incompatible with Grouse River’s *actual allegations*.⁷

20
 21 ⁵ Even in Grouse River’s self-serving and inaccurate summary of the allegations in the
 22 complaint that it asks the Court to adopt, *there is no allegation of fraud that is based on the
 23 terms of the parties’ agreement*.

24 ⁶ Moreover, it was because of Grouse River’s claim of fraudulent inducement, and the fact
 25 that Grouse River sought to challenge the validity of the parties’ agreements, that the Court held
 26 that the parol-evidence rule did not bar Grouse River’s claims. Oct. 12, 2016 Or. on Mot. Dismiss,
 27 Dkt. 41, at 8 (noting that the fraud exception to the parol-evidence rule “allows only claims that
 28 challenge a contract’s validity” and that “[c]laims that merely restate broken promises (read:
 contractual breaches) as fraud are not within the exception; these remain barred by the parol-
 evidence rule.”). To the extent that Grouse River now wishes to pursue a fraud claim that “merely
 restate[s] broken promises (read: contractual breaches)” as fraud, it would be barred by the parol-
 evidence rule. *Id.*

29 ⁷ NetSuite has submitted a competing statement of the actionable allegations of fraud that
 30 quotes verbatim from the complaint itself or the Court’s summary of those allegations. *See* Ex.
 31 11 to the parties’ Joint Proposed Pre-Trial Order.

1 As an example, in paragraph 53, Grouse River's complaint alleges that: "In an email
 2 immediately following [an April 4, 2013] call[,] Mr. Waldron [a NetSuite sales representative,]
 3 **provided documentation** representing that NetSuite could meet the vast majority of Grouse River's
 4 requirements[.]" Compl. ¶ 53. That allegation simply alleges that NetSuite provided Grouse River
 5 with "documentation" that (Grouse River alleges) said it could meet the "vast majority" of Grouse
 6 River's needs; it does not, however, say anything about what Grouse River's "requirements" were
 7 or that NetSuite said that it could meet the "vast majority" of those undisclosed needs.

8 Nonetheless, in Grouse River's recitation of paragraph 53, that allegation has morphed into
 9 a "promise" from NetSuite to meet each of Grouse River's specific requirements, which are
 10 detailed in paragraphs 44-51 of the complaint (e.g., to deliver an updated website, integrated point-
 11 of-sale, automated shipping, etc.). That is not what the complaint actually says and is also entirely
 12 inconsistent with the Court's order identifying the actionable allegations of fraud. In paragraphs
 13 41-51, Grouse River lays out the functionalities it was looking for in a new software system. The
 14 Court held that those allegations are not actionable because they are "**statements made by Grouse**
 15 **River**" at some indeterminate time, to some indeterminate person, as to Grouse River's "hopes"
 16 regarding its future software purchase. Jan. 5, 2018 Am. Or., Dkt. 88, at 12. The allegations in
 17 paragraph 41-51 simply reflect what Grouse River was looking for and not any commitment from
 18 NetSuite. The Court already ruled that the "specific representation" that Grouse River can attempt
 19 to prove was fraudulent is the "statement that NetSuite 'could meet the vast majority of Grouse
 20 River's requirements.'" *Id.* The Court should not allow Grouse River to rewrite its complaint
 21 after the fact, and turn allegations that the Court deemed non-actionable into actionable allegations,
 22 particularly when Grouse River has had multiple opportunities to amend its complaint and declined
 23 to do so.

24 Because it is apparent that Grouse River seeks to ask the jury to make a finding of fraud
 25 based on allegations that it either has not pled or the Court has deemed non-actionable, NetSuite
 26 requests that the Court include in the juror notebook NetSuite's proposed statements of actionable
 27 fraud (Ex. 11 to Joint Proposed Pre-Trial Order), so that the jury understands exactly what
 28 allegations of fraud it is being asked to decide in this case.

1 **C. The Court Should Exclude Evidence Of Non-Actionable Allegations So As**
 2 **Not To Confuse the Issues For The Jury**

3 In issuing its order on NetSuite’s motion for judgment on the pleadings, and identifying
 4 which of Grouse River’s many allegations actually sounded in fraud, the Court significantly
 5 narrowed the scope of this case and Grouse River’s fraud allegations. Jan. 5, 2018 Am. Or., Dkt.
 6 88. Given the Court’s order, and counsel’s representations that Grouse River is “confin[ing] its
 7 fraud case to the specific statements in the court’s order . . .,” there are, at most, sixteen actionable
 8 fraud allegations, which are detailed in NetSuite’s statement of actionable allegations attached to
 9 the Joint Proposed Pre-Trial Order. Jan. 17, 2019 Case Management Or., Dkt. 184, at 1; *see also*
 10 Ex. 11 to the Joint Proposed Pre-Trial Order.

11 Nonetheless, NetSuite expects that at trial, Grouse River will attempt to put on evidence
 12 regarding allegations that the Court has found non-actionable in an attempt to confuse the issues
 13 in this case. For example, and as noted above, the Court has held that Grouse River’s allegation
 14 that NetSuite “committed” to a four-month implementation is not an actionable allegation of fraud.
 15 Jan. 5, 2018 Am. Or., Dkt. 88, at 14. Despite the Court’s holding (and Grouse River’s decision
 16 not to amend its complaint), Grouse River seeks to put on a significant amount of evidence
 17 suggesting that NetSuite fraudulently induced Grouse River to enter into the parties’ contracts
 18 based on the non-actionable promise to implement its software within four months. We know this
 19 because Grouse River’s expert attributes significant damages to NetSuite’s supposed failure to
 20 implement its software within a four-month time period.

21 Because Grouse River is now seeking damages for conduct that the Court has found non-
 22 actionable, the Court should preclude Grouse River from introducing evidence regarding any non-
 23 actionable allegations. For example, given the Court’s Order, Grouse River should not be allowed
 24 to continue to maintain that NetSuite made any false promise or representation regarding a four-
 25 month implementation, or that Grouse River relied on any such promise in entering into the parties’
 26 agreements. The Court should preclude Grouse River from introducing evidence regarding non-
 27 actionable allegations because they are of no legal consequence, and therefore, not relevant to the
 28 actual issues in this case, *i.e.*, whether NetSuite engaged in fraud through the sixteen actionable

1 statements. *See, e.g.*, Fed. Rules Evid. 401 (“Evidence is relevant if (a) it has any tendency to
 2 make a fact more or less probable than it would be without the evidence and (b) the fact is of
 3 consequence in determining the action.”); Fed. Rules Evid. 402 (irrelevant evidence is not
 4 admissible). It would be confusing to the jury and highly prejudicial to NetSuite to allow Grouse
 5 River to introduce evidence of *non-actionable representations*, argue that they were false, that
 6 Grouse River relied on them, and that such reliance caused Grouse River harm.

7 Moreover, should Grouse River decide to dismiss its breach of contract claim from the
 8 case with prejudice, additional allegations will no longer be actionable or relevant, as there are
 9 certain allegations in the complaint that only pertain to Grouse River’s breach of contract claim
 10 and are not reflected in any of its fraud allegations. Should Grouse River dismiss its breach of
 11 contract claim, NetSuite reserves its right to raise additional issues regarding admissibility with
 12 the Court.

13 **D. Sanctions For Grouse River’s Spoliation Of Relevant Evidence**

14 In accordance with the Court’s revised scheduling order, on June 6, NetSuite will be filing
 15 a motion *in limine* to exclude Grouse River’s evidence of lost profits, or in the alternative, for an
 16 adverse inference, because of Grouse River’s spoliation of relevant evidence related to its financial
 17 condition and business operations. May 7, 2019 Revised Sch. Or., Dkt. 220.⁸

18 During the course of discovery in this case, NetSuite sought detailed information regarding
 19 Grouse River’s financial condition and the operation of its business so that it could disprove
 20 Grouse River’s allegation that NetSuite, as opposed to other factors, caused Grouse River’s alleged
 21 damages. While Grouse River eventually produced basic financial information (*e.g.*, financial
 22 statements), Grouse River never produced—either because it failed to preserve or because it
 23 simply refused—a significant amount of relevant information related to its financial condition and
 24 business operations.

25 Contrary to Grouse River’s assertion that NetSuite failed to properly raise these issues or

26 ⁸ This motion relies on testimony from Grouse River’s expert, Paul McEwen, whose
 27 deposition did not take place until May 24, 2019. For example, Mr. McEwen testified that Mr.
 28 Fallis provided him with Grouse River’s pre-NetSuite sales data when he asked for that data even
 though Grouse River refused to produce that data to NetSuite, and continues to insist that such
 sales data no longer exists.

1 has “waited until weeks before trial” to first raise them, NetSuite exhausted its options to obtain
 2 these critical (and still missing) documents from Grouse River, including, but not limited to, the
 3 following:

- 4 • Sales data from Grouse River’s pre-NetSuite software system (“Volusion”);
- 5 • Financial information provided to Grouse River’s bank, Royal Bank of
 6 Canada;
- 7 • Communications with its accountant, Grant Thornton;
- 8 • Communications with its shareholders; and
- 9 • Bank Statements.

10 There can be no real dispute that Grouse River spoliated evidence. Grouse River’s CEO
 11 testified that he believed he had a legal claim against NetSuite as early as April 2015 and that he
 12 was seriously contemplating litigation with NetSuite no later than February 2016; and Mr. Fallis’s
 13 documents confirm that as early as April 2015, he was threatening litigation against NetSuite. As
 14 a result, as of April 2015, at the earliest, and February 2016, at the latest, Grouse River had an
 15 obligation to preserve relevant evidence, including information related to Grouse River’s financial
 16 condition and business operations. Grouse River’s counsel and its CEO admit that they did not
 17 preserve a significant amount of financial information, including correspondence with Grouse
 18 River’s banks, accountant, bank statements, and other critical information, even after they initiated
 19 this litigation. In the past, Grouse River has argued that it had no duty to preserve this information
 20 despite the pendency of this litigation or that NetSuite is somehow not prejudiced because Grouse
 21 River had produced some other information. That is wrong, both as a matter of law, and
 22 practically, in terms of NetSuite’s defense of this case.

23 Grouse River is seeking to recover more than \$15 million in lost profit damages that it
 24 alleges NetSuite’s supposedly false representations caused Grouse River’s business. Grouse
 25 River, however, may only recover damages proximately caused by NetSuite’s alleged fraud, and
 26 not damages caused by other factors. *See Kruse v. Bank of Am.*, 202 Cal. App. 3d 38, 60 (1988).
 27 As a result of Grouse River’s spoliation, NetSuite does not have much of the contemporaneous
 28 information that would likely demonstrate that Grouse River’s financial troubles were caused not

1 by NetSuite, but by its history of unprofitability, lack of capital, and its decision to borrow nearly
 2 \$2 million to expand to a larger retail store. The absence of this information, all of which should
 3 have been preserved, “significantly hampers” NetSuite’s ability to prepare its defense. *In re*
 4 *Napster, Inc. Copyright Litig.*, 462 F. Supp. 2d 1060, 1077 (N.D. Cal. 2006).

5 As a result of Grouse River’s spoliation of relevant evidence, and the prejudice it has
 6 caused NetSuite, NetSuite asks that the Court preclude Grouse River from putting on evidence of
 7 its supposed lost profit damages, or in the alternative, provide the jury with an instruction including
 8 the following adverse inference:

9 Grouse River Outfitters Ltd. failed to preserve relevant evidence
 10 related to its financial condition and business operations for
 11 NetSuite’s use in this litigation. As a result of this conduct, you may
 12 presume that this missing financial information would have been
 13 harmful to Grouse River.

14 **II. GROUSE RIVER WILL NOT BE ABLE TO PROVE ITS FRAUD CLAIMS**

15 Grouse River will not be able to prevail on its fraud claims at trial or recover the windfall
 16 damages that it seeks.⁹

17 **A. Grouse River Will Not Be Able To Prove That NetSuite Made Any False 18 Representations In Its Marketing Materials**

19 Roughly half of Grouse River’s actionable allegations of fraud are based on NetSuite’s
 20 online marketing materials and press releases. At trial, Grouse River will not be able to prove that
 21 NetSuite’s online advertisements include any false representations regarding the capabilities of its
 22 software. NetSuite’s marketing materials simply convey, at a high level, the capabilities and
 23 functionality that NetSuite’s software could provide. They make no promises as to the specific
 24 functionality or capability that NetSuite will provide to any particular customer, including Grouse
 25 River. Other than arguing that NetSuite’s software did not work as Grouse River expected, Grouse
 26 River has put forward no evidence that NetSuite’s marketing materials were false or misleading,

27 ⁹ To prevail on its fraud claims, Grouse River will have to prove, by a preponderance of the
 28 evidence, (1) a false misrepresentation, (2) knowledge of falsity, (3) intent to defraud or induce
 29 reliance, (4) justifiable reliance, and (5) resulting damages. *See, e.g., Lazar v. Super. Ct.*, 12 Cal.
 30 4th 631, 638 (1996); *see also* CACI 1900 (2019). The elements for Grouse River’s negligent
 31 misrepresentation claim are the same except that Grouse River need only demonstrate that
 32 NetSuite had no reasonable grounds for believing that its representations were true when made.

1 or that NetSuite could not, in fact, do what it represented.¹⁰

2 Moreover, Grouse River will not be able to prove that NetSuite made many of the allegedly
 3 false representations in its marketing materials during the relevant time-period. As NetSuite
 4 explains in more detail in its Motion in Limine No. 3, the NetSuite advertisements that Grouse
 5 River quotes in its complaint largely post-date 2015—well after the parties entered into their
 6 agreements—and the NetSuite advertisements that were published in 2012 and 2013, when Grouse
 7 River supposedly reviewed them, make very different representations that do not support Grouse
 8 River’s allegations.

9 As is requested in NetSuite’s Motion in Limine No. 3, the Court should not allow Grouse
 10 River to rely on NetSuite advertisements that post-date the execution of the parties’ agreements—
 11 which Grouse River could not have plausibly relied on—to substantiate its fraudulent inducement
 12 claim, and should strike the allegations in paragraphs 23, 35, and 37 because Grouse River has
 13 produced no evidence to substantiate those allegations.¹¹

14 **B. Grouse River Will Not Be Able To Prove That NetSuite Made Any Of The
 15 Allegedly False Representations With Fraudulent Intent**

16 To prevail on its fraud claims, Grouse River must prove, not only that each alleged
 17 representation was false but also that NetSuite *knew* the statement was false *when it was made* (or
 18 that NetSuite made the statement recklessly without regard for its truth). *See CACI 1900 (2019)*
 19 (plaintiff must prove that defendant’s “representation was false” and that defendant “knew that the
 20 representation was false when it made it . . .”). To satisfy this element, Grouse River must do more
 21 than simply show that NetSuite failed to perform its contractual obligations. Evidence of non-
 22 performance is insufficient to establish fraudulent intent as a matter of law. *See, e.g., Precise Aero*
Mfg. v. MAG Aero. Indus., LLC, 2018 U.S. Dist. LEXIS 119100, at *19-21 (C.D. Cal. Feb. 16,
 23

24 ¹⁰ Grouse River will also not be able to demonstrate that NetSuite intended for Grouse River,
 25 specifically, to rely on its marketing materials in entering into the parties’ agreement, another
 26 necessary element of its claim. Grouse River alleges that the advertisements it viewed were
 27 publicly available on NetSuite’s website and there is no evidence that those advertisements were
 28 in any way directed at Grouse River.

27 ¹¹ Grouse River’s opposition to this motion in limine does not dispute that its complaint is
 28 based on 2015 and advertisements dating from 2015 and later which could not, in reality, have
 induced Grouse River to enter into any agreement. To the extent Grouse River has adduced no
 admissible evidence to support its claims, they cannot be submitted to the jury.

1 2018) (granting summary judgment on fraud claim where there was not “sufficient evidence” of
 2 fraudulent intent); *Mazed v. JP Morgan Chase Bank, N.A.*, 2014 U.S. Dist. LEXIS 48589, at *19
 3 (C.D. Cal. Apr. 7, 2014) (granting summary judgment on fraud claim where plaintiff had only put
 4 forward evidence of “non-performance”); *Tenzer v. Superscope, Inc.*, 39 Cal. 3d 18, 31 (1985)
 5 (“[I]f plaintiff adduces no further evidence of fraudulent intent than proof of nonperformance of
 6 an oral promise, he will never reach a jury.”). Grouse River’s fraud claims should not even get to
 7 the jury because Grouse River will not be able to put forward any evidence that at the time NetSuite
 8 made the supposedly false representations to Grouse River regarding the capabilities of its
 9 software, anyone at NetSuite, and particularly the sales representatives involved, knew (or should
 10 have known) they were false.

11 Because there is no evidence that the NetSuite sales representatives who made the allegedly
 12 false representations to Grouse River had any knowledge that the statements they were making
 13 were false when made (and, in fact, they were not false), NetSuite anticipates that Grouse River
 14 will attempt to rely on unsponsored communications from long after the fact authored by other
 15 NetSuite employees—employees who had no involvement in the Grouse River sales process—to
 16 try to establish fraudulent intent. This type of evidence is problematic for at least two reasons.

17 **First**, communications from individuals not actually involved in the sales process and that
 18 were written months or years later have limited, if any, probative value as to the state of mind of
 19 the NetSuite sales representatives who made the alleged representations months or years earlier,
 20 and are speculative and prejudicial because they will confuse the jury. *Cf. Precise Aero Mfg.*, 2018
 21 U.S. Dist. LEXIS 119100, at *19-21 (granting summary judgment on fraud claim where only
 22 evidence of fraud was communications made long after the alleged misrepresentations).

23 As an example, throughout this case, Grouse River has pointed to an October 2014 email
 24 among NetSuite’s implementation team, in which Nikolay Komissarenko writes to Karen Messick,
 25 who worked on the point-of-sale implementation for Grouse River, that “EMV” or “chip” credit
 26 cards, which were required in Canada, was “a known gap” in NetSuite’s products. Grouse River
 27 has argued, repeatedly, that this email evidences that NetSuite did not have the ability to provide
 28 credit card functionality in Canada, and that its sales team, therefore, must have known that

1 NetSuite lacked that functionality when it made its representations in 2013 to Grouse River.
2 However, in a later email in a different iteration of the same e-mail exchange, Ms. Messick corrects
3 Mr. Komissarenko, and clarifies that “[t]he functionality to integrate MPS w/EMV in Canada was
4 available in recent prior releases of POS and we have customers using it now.” Ms. Messick’s
5 later email confirms that NetSuite had, in fact, provided chip technology in Canada, and undercuts
6 Grouse River’s assertion that NetSuite could not, and knew it could not, provide credit card
7 functionality in Canada at the time it entered into its agreement with Grouse River.

8 **Second**, the Court should require that all exhibits have a sponsoring witness in order to be
9 admissible. Grouse River should not be allowed to admit into evidence internal NetSuite
10 communications that lack a sponsoring witness who can explain the communications and provide
11 context. As evidenced by the thread above, these documents have relevance and meaning only if
12 and when a percipient witness with knowledge of their contents, puts them in context. Without a
13 sponsoring witness, Grouse River will be able to misrepresent both their context and contents.
14 Accordingly, NetSuite requests that the Court, consistent with other judges in this district,
15 require that all exhibits have a sponsoring witness in order to be admissible. *See Korean Ramen*
16 *Antitrust Litig.*, 13-cv-04115-WHO, Dkt. 837-1 (rejecting plaintiff's request to admit documents
17 without a sponsoring witness because "a sponsoring witness" is necessary to provide context).

C. Grouse River Will Not Be Able to Prove That Its Reliance On Any Pre-Contract Statements Was Justified

19 Grouse River will also not be able to prevail on its claims because it will not be able to
20 demonstrate that it was justifiable for Grouse River to rely on any allegedly false pre-contract
21 representations, in light of: (1) the parties' extensive contract negotiations, (2) the integration and
22 anti-reliance disclaimers in the parties' agreements, and (3) Grouse River's later execution of
23 subsequent agreements, including the parties' BRD and Change Orders. For five months after the
24 parties entered into their contracts, Grouse River and NetSuite worked together to scope out
25 Grouse River's technology systems and business needs, and put together a 100+ page BRD that
26 sets forth in great detail Grouse River's desired functionalities and NetSuite's ability to meet those
27 needs. Similarly, the parties entered into detailed Change Orders to address any functionality new

1 to or different from what the parties previously agreed. In these subsequent contracts, the parties
 2 set forth in great detail exactly what Grouse River would receive and NetSuite would provide, and
 3 Grouse River ratified them and proceeded with the engagement. Thus, any continued reliance by
 4 Grouse River on vague, unspecified pre-contract representations was not reasonable or justified.

5 **D. Grouse River Will Not Be Able To Prove That The Allegedly False
 6 Representations Proximately Caused Its Damages**

7 Under California law, Grouse River must prove that the alleged fraudulent conduct
 8 proximately caused its damages. *Kruse*, 202 Cal. App. 3d at 60. To meet this standard, the plaintiff
 9 must show that it is “more likely than not [that] defendant’s conduct was [a] cause in fact of the
 10 result; mere possibility of such causation is not enough.” *Saelzler v. Advanced Group*, 25 Cal. 4th
 11 763, 776 (2001) (internal quotations and citations omitted). “If the defrauded plaintiff would have
 12 suffered the alleged damage even in the absence of the fraudulent inducement, causation cannot
 13 be alleged and a fraud cause of action cannot be sustained.” *1617 Westcliff LLC v. Wells Fargo
 14 Bank N.A.*, 2018 U.S. Dist. LEXIS 217527, at *15 (C.D. Cal. June 28, 2018) (quoting *Beckwith v.
 15 Dahl*, 205 Cal. App. 4th 1039, 1064 (2012)). Grouse River will not be able to prove that NetSuite’s
 16 alleged fraudulent statements proximately caused any of its alleged damages.

17 At trial, NetSuite’s economic expert, David Perry, will testify that Grouse River was in a
 18 precarious financial condition even before it entered into any agreement with NetSuite. Mr. Perry
 19 will explain that Grouse River made an ill-advised and poorly-timed decision to borrow nearly \$2
 20 million to expand to a “flagship” brick-and-mortar store, even though Grouse River had no history
 21 of profitable operations (and, in fact, had only earned a small profit in one year in its seven years
 22 in business pre-NetSuite). Grouse River’s sales could not support the increased expenses
 23 associated with the new store and Grouse River fell out of compliance with its bank loans almost
 24 immediately and before it entered into any agreement with NetSuite. In the two years before
 25 Grouse River entered into any agreement with NetSuite, Mr. Fallis’s mother, Wendy Fallis, had to
 26 inject hundreds of thousands of dollars into the company to keep the business afloat. Were it not
 27 for the personal wealth of Mr. Fallis and his family, Grouse River would have gone out of business
 28 well before Grouse River even entered into any agreement with NetSuite.

1 When Grouse River was out of compliance with its bank loans for a third year in a row, its
 2 bank foreclosed on its loans, and required that Mrs. Fallis inject an additional \$750,000 towards
 3 satisfying Grouse River's outstanding debts. After sinking more than \$4 million into her son's
 4 failed venture, Mrs. Fallis finally turned off the spigot. Grouse River no longer had the funds to
 5 remain in business and closed in July 2017. Mr. Perry will further testify that beyond its
 6 unsustainable cost structure in its "flagship" store and incurrence of substantial debt it could not
 7 afford, other external factors also harmed Grouse River's business, including the entrance of a
 8 significant competitor in the market and increasingly unfavorable changes in the Canadian/U.S.
 9 dollar currency exchange rate.

10 Grouse River will attempt to introduce the testimony of its own economic expert, Paul
 11 McEwen, who will opine (if the Court allows it) that NetSuite "might" have caused Grouse River
 12 upwards of \$15 million in past and future lost profits. Mr. McEwen, however, admits that he
 13 attributed 100 percent of Grouse River's alleged economic losses to NetSuite based on nothing
 14 more than the correlation between the timing of Grouse River's decision to enter into an agreement
 15 with NetSuite and its financial demise. Mr. McEwen concedes that he made no effort to consider
 16 whether *any other factor* might have caused some or all of Grouse River's damages, including its
 17 decision to take on significant debt, the increase in the company's cost structure after moving into
 18 its new store, the currency risk Grouse River faced selling inventory purchased in U.S. dollars, or
 19 the increase in competition from a new entrant in the market, yet also concedes that, had he
 20 considered those factors, it would have impacted his economic loss calculations. As NetSuite
 21 explains in its Motion in Limine No. 7, Mr. McEwen's complete failure to consider, and account
 22 for, other potential causes of Grouse River's economic losses renders his opinions unreliable and
 23 inadmissible under Federal Rule of Evidence 702. *See Oculu, LLC v. Oculus VR, Inc.*, 2015 U.S.
 24 Dist. LEXIS 74666, at *55-57 (C.D. Cal. June 8, 2015) (excluding an expert opinion equating
 25 correlation with causation without evidence).

26 **E. Grouse River Will Not Be Able To Prove That It Is Entitled To Any
 27 Significant Damages**

28 Grouse River seeks to recover more than \$15 million in past and future lost profits, \$1.2

1 million in out-of-pocket expenses, as well as punitive damages, despite the fact that in its decade
 2 in business Grouse River only earned a small profit in one year, in its original location, long before
 3 it entered into any agreement with NetSuite. Grouse River will not be able to demonstrate its
 4 entitlement to compensatory or punitive damages as a matter of law.

5 **1. With Or Without Its Breach of Contract Claim, Grouse River's
 6 Expert Has A Disaggregation Problem That Is Fatal To His Damages
 7 Opinions**

8 Regardless of whether Grouse River dismisses its breach of contract claim, Grouse River's
 9 expert's damages opinion is fatally flawed because his opinions do not account for Grouse River's
 10 ever-evolving theory of liability or the Court's rulings in this case. Mr. McEwen's economic loss
 11 calculations fail to separately show how Grouse River was harmed under each of its liability
 12 theories and provides no way to account for the parties' contractual limitation of liability provision.
 13 This failure to "disaggregate" requires that McEwen's opinion and economic loss models be
 14 excluded because the jury would otherwise be left to speculate as to the correct amount of
 compensable damages.

15 If the jury rejects any part of Grouse River's underlying claims (or, if Grouse River
 16 dismisses its breach of contract claim), Mr. McEwen has provided the trier of fact with no way to
 17 apportion damages among the underlying theories of harm. Regardless of whether Grouse River
 18 dismisses its breach of contract claim, Mr. McEwen's estimates are admittedly based, in some
 19 unidentified part, on assumed breaches of contract, the liability for which this Court has already
 20 ruled is capped by the limitation of liability provision in the parties' agreements. Nov. 21, 2018
 21 Or., Dkt. 172, at 1-2. Because Mr. McEwen's models do not allow the fact finder to delineate
 22 which damages arose from which claims, contract damages cannot be segregated (as would be
 23 necessary if the breach of contract claim is dismissed) or limited (as would be necessary if the
 24 claim remains).

25 Despite having multiple opportunities to amend its complaint and/or its damages analysis
 26 in light of these problems, Grouse River has steadfastly refused to do so. *See, e.g.*, Jan. 5, 2018
 27 Am. Or., Dkt. 88, at 7:19-20; Jan. 27, 2018 Revised Sch. Or., Dkt. 93. Its recent request, *on the
 28 eve of trial* and almost six months after Mr. McEwen issued his initial report, to amend the Second

1 Amended Complaint to remove its breach of contract claim, only compounds the problem. May
 2 19, 2019, Mot. to Amend, Dkt. 221. Whether the breach of contract claim is tried or not, Mr.
 3 McEwen can only present the jury with estimates that include breach of contract damages that
 4 must be (but cannot be) segregated or capped.

5 On June 6, NetSuite will be filing its Motion in Limine No. 8 which requests that the Court
 6 exclude Mr. McEwen's economic loss calculations under Federal Rule of Evidence 702 because
 7 they provide the jury with no way to meaningfully disaggregate among Grouse River's theories of
 8 liability and would require the jury to engage in impermissible guess work to determine damages.

9 **2. Grouse River Cannot Demonstrate That Its Lost Profit Damages Are
 10 Reasonably Certain**

11 Under California law, a plaintiff seeking to recover lost profit damages must prove that
 12 such damages are "*reasonably certain*" in both their "*occurrence* and *extent*." *Sargon Enters., Inc. v. Univ. of Southern Cal.*, 55 Cal. 4th 747, 773-74 (2012) (emphasis added) (internal
 13 quotations and citations omitted). A plaintiff may not recover—or put on evidence of—lost profit
 14 damages that are "uncertain, hypothetical, and entirely speculative." *Id.* at 775. Mr. McEwen's
 15 opinions regarding Grouse River's past and future lost profits are too speculative and uncertain to
 16 be admissible or to demonstrate Grouse River's entitlement to recover such damages.
 17

18 Mr. McEwen's opinions regarding Grouse River's "past" lost profits—*i.e.*, profits up until
 19 July 2017 when Grouse River went out of business—are based entirely on overly optimistic
 20 internal sales projections prepared solely by Mr. Fallis that Mr. McEwen admits he made no effort
 21 to independently verify. Courts regularly hold that lost profit calculations that assume future
 22 success based on nothing more than the say-so of a company's management are too speculative to
 23 be admissible. *See Fiteq Inc. v. Venture Corp.*, 2016 U.S. Dist. LEXIS 22037, at *20-26 (N.D.
 24 Cal. Feb. 22, 2016); *Azco Biotech, Inc. v. Qiagen, N.V.*, 2015 U.S. Dist. LEXIS 181173, at *6-8
 25 (S.D. Cal. Nov. 12, 2015); *Pet Food Express Ltd. v. Royal Canin USA, Inc.*, 2011 U.S. Dist.
 26 LEXIS 42350, at *31-36 (N.D. Cal. Apr. 18, 2011).

27 Mr. McEwen's opinion regarding the "illustrative" lost profits that Grouse River "might"
 28 have earned had it not gone out of business in July 2017—his "future loss" calculation—is even

1 more speculative and problematic. Mr. McEwen estimates Grouse River’s “projected EBITDA,”
 2 which, he admits, is not a net profits calculation and reflects something *greater* than net profits,
 3 which Grouse River is not entitled to recover. *See Gerwin v. Southeastern Cal. Ass’n of Seventh*
 4 *Day Adventists*, 14 Cal. App. 3d 209, 233 (Cal. Ct. App. 1971) (if a plaintiff “is entitled to recover
 5 at all . . . such recovery **must be confined to his net profits.**”) (emphasis added). Moreover, Mr.
 6 McEwen admits that he is offering no opinion on whether Grouse River, a historically unprofitable
 7 company, would have been profitable or even remained in business after July 2017 but for the
 8 NetSuite implementation, and thus concedes that all of his future loss calculations are entirely
 9 “uncertain.”

10 As is explained in more detail in NetSuite’s Motion in Limine No. 6, the Court must
 11 exercise its gatekeeping function under both California law and Federal Rule of Evidence 702 to
 12 preclude Grouse River’s expert from offering his speculative and admittedly uncertain calculations
 13 regarding Grouse River’s lost profit damages.

14 **3. Grouse River Will Not Be Able To Demonstrate Fraud With An
 15 Intent To Harm With Clear And Convincing Evidence To Recover
 16 Punitive Damages**

17 Grouse River also seeks to recover punitive damages for its fraudulent misrepresentation
 18 and fraudulent inducement claims. Grouse River, however, can only recover punitive damages if
 19 it can establish by “*clear and convincing*” evidence that NetSuite committed “fraud,” which for
 20 the purpose of recovering punitive damages, requires showing that NetSuite “intentionally
 21 misrepresented or concealed a material fact and did so *intending to harm Grouse River.*” CACI
 22 3945.¹² To recover punitive damages, Grouse River must not only meet a higher threshold of
 23 culpability—“intent to harm”—but also must make that showing under the more burdensome
 24 evidentiary standard of clear and convincing evidence. It will not be enough for Grouse River to

25 ¹² Grouse River’s complaint seeks to recover punitive damages for its negligent
 26 misrepresentation claim, Compl. ¶ 241, but under California law, punitive damages are not
 27 available for negligent misrepresentation. *See, e.g., PM Group, Inc. v. Stewart*, 154 Cal. App. 4th
 28 55 (Cal. Ct. App. 2007) (“[I]t is well settled that punitive damages are not recoverable for negligent
 misrepresentation.”); *Reid v. Moskovitz*, 208 Cal. App. 3d 29, 32 (1989) (vacating punitive
 damages award based on negligent misrepresentation because “punitive damages are not
 recoverable for negligent misrepresentation.”) (internal quotations and citations omitted).

1 simply prevail on its fraud claim. *Cf. Terra Ins. Co. v. N.Y. Life Inv. Mgmt. LLC*, 717 F. Supp. 2d
 2 883, 895 (N.D. Cal. 2010) (denying summary judgment on fraud claim but granting summary
 3 judgment on issue of punitive damages because plaintiff's evidence was “not of sufficient caliber
 4 or quantity . . . to allow a rational finder of fact to find actual malice by clear and convincing
 5 evidence.”). At best, Grouse River will only have circumstantial evidence of NetSuite's fraudulent
 6 intent which will be insufficient as a matter of law to demonstrate by clear and convincing evidence
 7 that NetSuite intended to harm Grouse River. *See id.* (granting summary judgment on punitive
 8 damages where “scienter [was] supported only by circumstantial evidence.”).

9 **IV. NETSUITE WILL PREVAIL ON ITS AFFIRMATIVE DEFENSES**

10 **A. NetSuite Will Demonstrate That Grouse River Waived Its Fraud Claim**

11 Under California law, “one who, after discovery of an alleged fraud, ratifies the original
 12 contract **by entering into a new agreement** granting him substantial benefits with respect to the
 13 **same subject matter**, is deemed to have waived his right to claim damages for fraudulent
 14 inducement.” *Oakland Raiders v. Oakland-Alameda Cty Coliseum*, 144 Cal. App. 4th 1175, 1185-
 15 86 (2006).

16 At trial, NetSuite will be able to demonstrate, by clear and convincing evidence, that each
 17 of the elements of waiver is satisfied. By entering into the BRD and Change Orders, which
 18 describe in detail exactly what NetSuite would be delivering to Grouse River, and what
 19 functionality required additional customization, Grouse River entered into “new agreements” on
 20 the “same subject matter” and received a “substantial benefit,” as Grouse River received custom
 21 scripts and accompanying professional services for free. By agreeing to the BRD and Change
 22 Orders, and not standing on its claim of fraudulent inducement, Grouse River “ratified” the parties’
 23 original agreements and waived any claim of fraud. *See Oakland Raiders*, 144 Cal. App. 4th at
 24 1190 (“a person defrauded in a transaction may, by conduct inconsistent with an intention to sue
 25 for damages for the fraud, waive the right to sue.”); *DM Residential Fund LLC v. First Tenn. Bank*
 26 *N.A.*, 2013 U.S. Dist. LEXIS 191526, at *10-14 (C.D. Cal. July 10, 2013) (holding that, as a matter
 27 of law, plaintiff had waived its right to sue for fraud by entering into subsequent agreement on
 28 same subject matter).

1 **B. NetSuite Will Also Demonstrate That Grouse River Failed To Mitigate Its**
 2 **Damages**

3 If Grouse River is to be believed, its implementation of NetSuite's software was an
 4 unmitigated disaster that prevented it from doing any business in its retail store or online and
 5 immediately threatened its ability to operate. If that were true, then Grouse River had a duty to
 6 mitigate its losses, including by either switching back to its prior software (which its expert
 7 maintains it could have used until it reached sales of nearly \$12 million) or purchasing new
 8 software. *Shaffer v. Debbas*, 17 Cal. App. 4th 33, 41 (1993) ("A plaintiff who suffers damage as
 9 a result of either a breach of contract *or a tort* has a duty to take reasonable steps to mitigate those
 10 damages and will not be able to recover for any losses which could have been thus avoided.")
 11 (emphasis added).

12 Grouse River made no effort to mitigate its losses by moving away from NetSuite's
 13 software, and the evidence will show why: because NetSuite's software was not causing Grouse
 14 River's losses. Grouse River's failure to do anything to mitigate not only undercuts Grouse River's
 15 ability to recover damages, but also demonstrates that the premise of Grouse River's lawsuit is
 16 false. Grouse River operated its business successfully on NetSuite, achieving within a few months
 17 of "go-live," some of the highest sales in its history. Those sales increases were simply not enough
 18 to pull Grouse River out of the financial tailspin caused by Grouse River's crushing debt and
 19 expenses related to its "flagship" store, all of which pre-date and have nothing to do with NetSuite.

20
 21 Dated: May 30, 2019

Respectfully submitted,

22 /s/ Sarah M. Ray

23 Sarah M. Ray
 24 LATHAM & WATKINS LLP
 25 Attorney for Defendant Oracle Corporation